No. S247278
(Court of Appeal No. A152056)
(San Francisco County Superior Court No. 17007715)

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

In re KENNETH HUMPHREY

On Habeas Corpus.

AMICI CURIAE BRIEF OF CURRENT AND FORMER PROSECUTORS AND LAW ENFORCEMENT OFFICIALS IN SUPPORT OF RESPONDENT KENNETH HUMPHREY

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STATEMENT OF THE ISSUE

Did the Court of Appeal err in holding that principles of constitutional due process and equal protection require consideration of a criminal defendant's ability to pay in setting or reviewing the amount of monetary bail?

INTRODUCTION

Fundamental fairness is a crucial element of an effective and equitable criminal justice system. Public perception of an unfair system undermines the legitimacy of prosecutions and threatens the stability of the rule of law. As Justice Frankfurter simply phrased it, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954); s*ee also Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666 (2015) ("[P]ublic perception of judicial integrity is 'a state interest of the highest order.'" (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009))); *Young v. United States ex rel. Vuitton Et Fils S.A.*, 481 U.S. 787, 811 (1987) ("A concern for actual prejudice . . . misses the point, for what is at stake is the public perception of the integrity of our justice system."). In a recent decision holding that a judge violated due process by failing to meaningfully inquire into ability to pay when setting bond, the U.S. District Court for the Eastern

District of Louisiana reiterated that "[t]he appearance of justice is vital to perpetuation of the rule of law, a concept upon which our society is based." *Caliste v. Cantrell*, No. 17-6197, 2018 U.S. Dist. LEXIS 131271, at *44 (E.D. La. Aug. 6, 2018).

The Constitution has long stood for the principle that people who would otherwise be eligible for release cannot be incarcerated simply because they are poor. In this case, the petitioner, respondent, and Court of Appeal all agree: conditioning a criminal defendant's freedom on payment of money bail, absent a determination of ability to pay, violates this bedrock constitutional protection. Amici prosecutors and law enforcement officials submit this brief in support of the parties' positions and the Court of Appeal's determination that the Fourteenth Amendment dictates that a court must, "in setting money bail, consider the defendant's ability to pay and refrain from setting an amount so beyond the defendant's means as to result in detention." COA Opinion, p. 31. Anything else would be manifestly unfair.

We address this Court's first question: whether constitutional due process and equal protection guarantees require consideration of a criminal defendant's ability to pay in setting or reviewing the amount of money bail. Although all parties agree with the Court of Appeal's

determination that consideration of ability to pay is constitutionally necessary, amici prosecutors and law enforcement officials offer additional support for the Court of Appeal's conclusion and address arguments made by defenders of money bail where the same question has arisen in other courts.

Amici do not take a position on the second two questions.

I. A Criminal Justice System Free From Wealth-Based Discrimination Is Critical to the System's Legitimacy and Fairness

A. Bail-Reform Efforts Have Long Recognized that Wealth-Based Detention is Unjust

The "traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (citation omitted). In so ruling, the U.S. Supreme Court was not merely addressing monetary bail, but was affirming more broadly the "right to release before trial . . . conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty." *Id.; see also Holland v. Rosen*, 895 F.3d

272, 291 (3d Cir. 2018) ("Neither does a contemporary definition of bail mean exclusively monetary bail; nonmonetary conditions of release are also 'bail.'").

As many advocates for bail reform have recognized over the decades, a bail system that detains certain people based solely on their inability to afford money bail "'results in serious problems for defendants of limited means, imperils the effective operation of the adversary system, and may even fail to provide the most effective deterrence of nonappearance by accused persons.'" H.R. Rep. No. 89-1541, at 11 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2293, 2298 (quoting report of U.S. Attorney General's Committee on Poverty and the Administration of Criminal Justice Procedure). As the Senate Committee on the Judiciary acknowledged in its report on the Federal Bail Reform Act of 1966:

> There was widespread agreement among witnesses that the accused who is unable to post bond, and consequently is held in pretrial detention, is severely handicapped in preparing his defense. He cannot locate witnesses[and] cannot consult his lawyer in private . . . . Furthermore, being in detention, he is often unable to retain his job and support his family, and is made to suffer the public stigma of incarceration even though he may later be found not guilty.

S. Rep. No. 89-750, at 7 (1965). Significantly, the U.S. House of Representatives Report on the bill also noted that, with the exception of bail bondsmen, all subcommittee-hearing "witnesses favored the enactment of this proposal" to reform the federal bail system. H.R. Rep. No. 89-1541, at 7, 1966 U.S.C.C.A.N. at 2297.

The Federal Bail Reform Act of 1966 took a major step toward ensuring that all persons, regardless of financial status, would have an opportunity for pretrial release. It required judicial officers to order the pretrial release of a noncapital defendant on personal recognizance or an unsecured appearance bond *unless* the judicial officer determined "that such a release will not reasonably assure the appearance of the person as required." Pub. L. No. 89-465, § 3(a), 80 Stat. 214, 214 (codified as amended at 18 U.S.C. § 3142). Upon such a finding, and after an individualized assessment of the defendant's circumstances, it permitted the judicial officer to impose conditions of release, giving priority to nonfinancial conditions. *Id.*

When the Federal Bail Reform Act of 1984 was passed, allowing courts to consider dangerousness when imposing conditions of release and permitting detention where no conditions could reasonably ensure the defendant's appearance or public safety, the Act also added a

provision explicitly prohibiting the imposition of a financial condition that results in pretrial detention because the defendant lacks the ability to pay. Pub. L. No. 98-473, § 203(a), 98 Stat. 1837, 1976-80 (codified at 18 U.S.C. § 3142(c)(2), (e)-(g)).

In amici's experience, procedures that discourage monetary bail, such as those afforded under the federal bail system, have been effective not only in mitigating the risk of nonappearance but also in fashioning conditions of release that ensure public safety and protect victims. *See, e.g.*, 18 U.S.C. § 3142(c)(1)(B)(v) (avoid contact with alleged victim), (vi) (report regularly to designated law enforcement or pretrial services agency), (viii) (refrain from possessing a firearm or dangerous weapon), and address personal circumstances that may have contributed to the unlawful behavior, *see, e.g.*, *id.* § 3142(c)(1)(B)(ii) (maintain or seek employment), (iii) (maintain or commence education), (ix) (refrain from excessive use of alcohol or any nonprescribed use of controlled substances), (x) (undergo medical, psychological, or psychiatric treatment). These systems can allow for custom-tailoring of conditions to individual circumstances and encourage compliance by providing that violations may result in revocation of release and prosecution for contempt of court. *Id.* § 3148.

B. Unnecessary Pretrial Detention Has Severe Adverse Consequences that Implicate Public Safety Concerns

Although many states have reformed—or are in the process of reforming—their bail systems to allow for different pretrial-release options based on individualized determinations of flight risk and dangerousness,[2] the use of money bail and the hardships it unfairly imposes on indigent people persist in many jurisdictions today, including California.[3]

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[2] *See, e.g.,* Arizona (Ariz. R. Crim. P. 7.2(a), 7.3); Arkansas (Ark. R. Crim. P. 9.1, 9.2(a)); Connecticut (Conn. Gen. Stat. §§ 54-63b(b), 54-63d(a), (c)); D.C. (D.C. Code § 23-1321); Illinois (725 Ill. Comp. Stat. 5/110-2); Kentucky (Ky. Rev. Stat. Ann. § 431.066); Maine (Me. Rev. Stat. tit. 15, §§ 1002, 1026); Maryland (Md. Rule 4-216.1(b)); Massachusetts (Mass. Gen. Laws. ch. 276, § 58); Michigan (Mich. Comp. Laws. § 780.62); Minnesota (Minn. Stat. § 609.49, Minn. R. Crim. Proc. § 6.02(1)); Missouri (Mo. Sup. Ct. R. 33.01(d)-(e)); Montana (Mont. Code Ann. § 46-9-108); Nebraska (Neb. Rev. Stat. § 29-901); New Hampshire (N.H. Rev. Stat. Ann. § 597:2); New Jersey (N.J. Stat. Ann. § 2A:162-15); New Mexico (N.M. Const. art. II, § 13); North Carolina (N.C. Gen. Stat. § 15A-534(b)); North Dakota (N.D. R. Crim. P. 46(a)); Oregon (Or. Rev. Stat. §§ 135.245, 135.260); Rhode Island (R.I. Gen. Laws § 12-13-1.3); South Carolina (S.C. Code Ann. § 17-15-10(A)); South Dakota (S.D. Codified Laws § 23A-43-3); Tennessee (Tenn. Code Ann. § 40-11-116); Vermont (Vt. Stat. Ann. Tit. 13, § 7554); Washington (Wash. Super. Ct. Crim. R. 3.2(b)); Wisconsin (Wis. Stat. §§ 969.01 to .03); Wyoming (Wy. R. Crim. P. 46.1(c)-(d)); *see also* S. Poverty Law Ctr., *SPLC Prompts 50 Alabama Cities to Reform Discriminatory Bail Practices* (Dec. 6, 2016), https://www.splcenter.org/news/2016/12/06/splc-prompts-50-alabama-cities-reform-discriminatory-bail-practices.

[3] California recently passed a version of reform in Senate Bill No. 10, to become operative on October 1, 2019, which will be addressed by the parties in their supplemental briefs. Amici note that the bill has garnered opposition from both proponents and opponents of bail reform. *See* Alexei Koseff, *Jerry Brown Signs Bill Eliminating Money Bail in California*, Sacramento Bee,

Amici are well aware that detention before trial, even briefly, can result in the loss of employment, shelter, government assistance, education, and child custody. An individual detained in jail—even though still presumed innocent—may be unable to access necessary mental-health and medical treatment, including drug therapy. Opportunities for pretrial diversion programs, often available to those on pretrial release, may be unavailable to detainees. Pretrial diversion programs helpfully redirect defendants away from incarceration and address underlying factors that contribute to criminal behavior such as drug abuse, mental illness, and veteran-related issues. *See infra* at 22-24. And access to counsel while in detention may be severely hampered, undermining preparation of a defense, enlistment of witnesses, and accumulation of evidence. These factors contribute to worse outcomes for detained indigent defendants, including a greater

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Aug. 28, 2018, https://www.sacbee.com/news/politics-government/capitol-alert/article217461380.html (describing "heavy opposition from the bail industry and some former supporters of the bill," including the ACLU and community groups). Given the uncertainty surrounding this bill and its implementation, and the delay until it becomes operative, it remains important to obtain a strong ruling from this Court that application of the current money bail system in California to indigent defendants like Mr. Humphrey is unconstitutional. Additionally, this case presents the Court an opportunity to clarify the procedural and substantive requirements that must be satisfied before a court can issue a detention order.

likelihood of conviction and a greater likelihood of a longer sentences compared to those released.[4]

To avoid these negative consequences, accused persons may seek quick guilty pleas, particularly if they are eligible for probation, as the most expedient way to obtain release.[5] As Judge Rosenthal described in *ODonnell v. Harris County*, the evidence presented there "overwhelmingly prove[d] that thousands of misdemeanor defendants each year are voluntarily pleading guilty knowing that they are choosing a conviction with fast release over exercising their right to trial at the cost of prolonged detention." 251 F. Supp. 3d 1052, 1107 (S.D. Tex. 2017) [*ODonnell I*]. This desperate decision made by defendants in pretrial detention may result in the conviction of innocent people, caught in the Hobson's choice between pleading guilty and

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[4] Conference of State Court Admins., *2012-2013 Policy Paper: Evidence-Based Pretrial Release* 5 (2013), https://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/Evidence%20Based%20Pre-Trial%20Release%20-Final.ashx.

[5] *See* Will Dobbie et al., *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges* 2 (Nat'l Bureau of Econ. Research Working Paper No. 22511, 2017), https://www.princeton.edu/~wdobbie/files/bail.pdf (finding a decrease in conviction rates for people released pretrial, "largely driven by a reduction in the probability of pleading guilty," with data suggesting that the decrease occurs "primarily through a strengthening of defendants' bargaining positions before trial").

being immediately (or more quickly) released, or contesting their charges and continuing to be detained even while retaining, at least formally, the presumption of innocence. As Judge Rosenthal concluded, it is "the predictable effect of imposing secured money bail on indigent misdemeanor defendants." *Id.* The same is true for felony defendants.

In addition to having negative consequences for individuals detained in jail, pretrial incarceration also has adverse consequences for public safety. Rather than keeping communities safer, pretrial detention—even for just 24 or 48 hours—can actually increase future criminal behavior and likelihood of arrest, particularly for defendants who are determined to be lower risk. For example, a study of defendants in a Kentucky jail found that the duration of pretrial detention was associated with significant increases in both new pretrial criminal activity (after release) and future recidivism,[6] and data from Harris County, Texas, show that pretrial detention of misdemeanor defendants is associated with increased future crime and re-

[6] Christopher T. Lowenkamp et al., Laura & John Arnold Found., *The Hidden Costs of Pretrial Detention* 4 (2013), https://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf.

incarceration.[7] As officials charged with protection of the public, amici have deep concerns that California's current system increases danger to victims and the community, contrary to one of the chief purported purposes of bail. Moreover, pretrial detention is very costly, *see infra* at 24, and diverts resources that could be better used for more effective public safety interventions.

In amici's experience, individualized assessments and pretrial release with nonfinancial conditions where appropriate are more effective than money bail not only in mitigating the risk of nonappearance, but also in ensuring a fair criminal justice system, enhancing public safety, addressing the underlying causes of criminal activity and recidivism, and saving public funds that can be better invested in preventing and fighting crime.

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[7] Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 718 (2017) (examining misdemeanor defendants in Harris County and finding that "detention is associated with a 30% increase in new felony charges and a 20% increase in new misdemeanor charges" in the 18-month period after a bail hearing); *see also* Michael Mueller-Smith, *The Criminal and Labor Market Impacts of Incarceration* 3 (Working Paper, 2015), https://sites.lsa.umich.edu/mgms/wp-content/uploads/sites/283/2015/09/incar.pdf (examining the effects of post-sentencing incarceration in Harris County and finding that the "short-run gains" of incapacitation while a person is jailed "are more than offset by long-term increases in post-release criminal behavior").

C. Perception of Fairness is the Foundation of an Effective Criminal Justice System

The importance of a fair criminal justice system, including at the critical early moment of setting pretrial release conditions, cannot be overstated. As amici are well aware, the people most adversely impacted by wealth-based bail systems are often those from communities where crime is more prevalent. Victims and witnesses on whom prosecutors rely for evidence and testimony often are or have been defendants in criminal cases, especially misdemeanor cases. And it is quite common for a family member or close friend of a victim or witness to have been charged with a crime at some point.

The willingness of these victims and witnesses to report crimes to law enforcement, cooperate with prosecutors, show up for court proceedings, and testify truthfully depends in part on their confidence that the judicial system will treat them and their loved ones fairly. Seeing indigent defendants detained (or experiencing it themselves) because they are unable to afford a money bail, while others similarly situated but able to post bail go free, undermines the legitimacy of the criminal justice system and the credibility of those entrusted to prosecute crimes within it.

A fair criminal justice system free from wealth-based discrimination is also critical to the effective functioning of our jury system. Jurors are drawn from the communities in which the crimes being prosecuted occur. In amici's experience, potential jurors—much like victims and witnesses—often have themselves been charged with a crime or have family or friends who have been charged with crimes. When jurors perceive the criminal justice system as unfair or illegitimate, they might discredit evidence presented by prosecutors or, worse, fail to follow the law.

D. Equal Protection and Due Process Prohibit Wealth-Based Detention

As the Supreme Court noted in *Bearden v. Georgia*, the Court "has long been sensitive to the treatment of indigents in our criminal justice system" and has applied the principle of "equal justice" articulated in *Griffin v. Illinois*, 351 U.S 12, 19 (1956) (plurality), in numerous contexts.[8] *See Bearden*, 461 U.S. 660, 664 (1983) (citing

[8] In *Griffin*, the Supreme Court invalidated a practice of limiting appellate review of criminal convictions only to persons who could afford a trial transcript, pronouncing: "[b]oth equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court." 351 U.S. at 17 (internal quotation marks omitted).

cases invalidating state practices denying indigents access to appellate review, appellate counsel, transcripts and other materials for appeal). *Bearden* invalidated a state practice of automatically revoking probation for failure to pay a fine or restitution, without considering whether the probationer has made all efforts to pay yet cannot do so, and without considering whether other alternative measures are adequate to meet the state's interest in punishment and deterrence. *Id.* at 672. "To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine." *Id.* at 672-73.

The principles articulated in *Griffin*, *Bearden*, and other similar cases have even greater applicability before trial, when the accused is presumed innocent and the liberty interest is therefore notably higher than after conviction. *See Stack*, 342 U.S. at 4 ("Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."); *Pugh v. Rainwater*, 572 F.2d 1053, 1056 (5th Cir. 1978) (accused persons "remain clothed with a presumption of innocence and with their constitutional guarantees intact").

The U.S. Court of Appeals for the Fifth Circuit recently confronted these problems directly in a challenge to bail procedures for misdemeanor defendants in Harris County, Texas. The court there described the stark inequality of that system:

> [T]ake two misdemeanor arrestees who are identical in every way—same charge, same criminal backgrounds, same circumstances, etc.—except that one is wealthy and one is indigent. . . . [W]ith [the County's] lack of individualized assessment and mechanical application of the secured bail schedule, both arrestees would almost certainly receive identical secured bail amounts. One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart. The district court held that this state of affairs violates the equal protection clause, and we agree.

ODonnell v. Harris County, 892 F.3d 147, 163 (5th Cir. 2018) [*ODonnell II*]. The Fifth Circuit also found that the procedures in Harris County violated due-process principles because they "almost always" resulted in the setting of a money bail amount that detained the indigent. *Id.* at 159-60.

The legitimacy of our criminal justice system and its presumption of innocence before trial—essential to the effectiveness of prosecutors and law enforcement officials—should not be undermined

by a bail system that infringes on both due process and equal protection requirements.

E. The Procedures Used by the Trial Court in This Case Demonstrate the Problems with Money Bail

This case puts these issues into focus. The trial court, applying the guidelines in the bail schedule, initially set Mr. Humphrey's financial condition of release at $600,000, an amount it was aware that Mr. Humphrey could not afford, even if he were to pay a fraction to a commercial bondsperson. On Mr. Humphrey's application, the court later reduced the bail amount to $350,000, another amount that he could not afford, conditioned on his attending drug treatment upon his release. As the Court of Appeal noted, "[t]he court did not comment on the anomalousness of imposing a condition of release that it made impossible for petitioner to satisfy by setting bail at an unattainable figure." COA Opinion p. 11. The act of reducing Mr. Humphrey's bail and imposing an equally impossible condition was meaningless to Mr. Humphrey, who could not pay either sum. In amici's experience, this type of "anomalous" ruling can, unsurprisingly, undermine confidence in the fairness of the criminal justice system.

Perceptions of impartiality are further imperiled when, as the trial court did here, courts impose financial conditions pursuant to bail

schedules that adopt a one-size-fits-all view of pretrial incarceration. In California, particularly for "poor persons arrested for felonies, reliance on bail schedules amounts to a virtual presumption of incarceration." COA Opinion, p. 40 (citing study finding that 40 to 50 percent of pretrial inmates would be released if they could afford to pay bail). As the federal Fifth Circuit described, "[u]tilization of a master bond schedule provides speedy and convenient release for those who have no difficulty in meeting[] its requirements. The incarceration of those who cannot, without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements." *Rainwater*, 572 F.2d at 1057 (footnote omitted).

Moreover, when the use of a schedule results in a de facto detention order, particularly for nonviolent defendants, it sends the stark message that, regardless of a person's likelihood to return to court and lack of dangerousness, he is to remain in jail unless he can pay the preset price of freedom. As the Court of Appeal here explained, bail "schedules . . . represent the antithesis of the individualized inquiry required before a court can order pretrial detention." COA Opinion, p. 37. Meaningful inquiry into ability to pay and the imposition of nonmonetary conditions of release where appropriate (like attending

inpatient drug treatment, as ordered for Mr. Humphrey in this case) can both cure constitutional infirmities *and* help to mitigate perceptions of unfairness, all while ensuring court attendance and preserving public safety.

Furthermore, the trial court's ruling underlines the irrationality of money bail. As with the federal Fifth Circuit's hypothetical in *ODonnell II*, if Mr. Humphrey had possessed all the same characteristics—i.e., had been charged with the same offenses on the same evidence, with the same personal history, risk of flight, and potential dangerousness—but had $350,000 in assets on hand, he would have been set free before trial.

As the Court of Appeal here recognized, "[m]oney bail . . . has no logical connection to protection of the public, as bail is not forfeited upon commission of additional crimes. . . . [A] wealthy defendant will be released despite his or her dangerousness while an indigent defendant who poses minimal risk of harm to others will be jailed." COA opinion, pp. 20-21. This system, which both discriminates against the poor and fails to protect the public, is inimical to the standards of equal justice espoused by the Supreme Court and thus cannot pass constitutional muster.

The de facto detention orders imposed as a result of money bail that a defendant cannot afford to pay also violate constitutional due-process requirements. In *United States v. Salerno*, 481 U.S. 739 (1987), the Supreme Court laid out procedures for pretrial detention that allow the government's interest in public safety to overcome an individual's liberty interest, which require "a full blown adversary hearing" at which "the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." *Id.* at 750. In contrast, when a predetermined schedule sets the amount of bail, there are virtually no procedural protections, and the Government has made no showing that an individual's detention is necessary. This does not suffice to justify detention, and cannot meet *Salerno*'s exacting standards.

II. Where It is Used, Nonfinancial Pretrial Release Is Effective at Achieving Court Attendance and Preserving Public Safety

Alternatives to money bail can accomplish the pretrial goals of the criminal justice system as well as, or better than, money bail, but without the attendant unfairness to indigent defendants. As an extensive body of evidence reveals, pretrial release with nonfinancial

conditions determined by individualized assessments[9] can be very effective at ensuring appearance for court proceedings.

In Kentucky, for example, county judges in 2013 began using a new risk-based assessment tool to inform decisions about pretrial release options. Laura & John Arnold Found., *Results from the First Six Months of the Public Safety Assessment-Court in Kentucky* 1 (2014), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/PSA-Court-Kentucky-6-Month-Report.pdf. Data from 2014 and 2015 showed that 85 percent of defendants released before trial appeared as required; in the low-risk category, the appearance rate was over 90 percent. Kentucky Administrative Office of the Courts Data, https://icmelearning.com/ky/pretrial/resources/KentuckyPretrialServicesFYData.pdf [hereinafter *Kentucky 2014-2015 Data*].

[9] Amici recognize that algorithmic risk-assessment instruments have received significant recent criticism for their potential to perpetuate pre-existing racial disparities in the justice system and to increase unnecessary pretrial incarceration. *See The Use of Pretrial "Risk Assessment" Instruments: A Shared Statement of Civil Rights Concerns*, http://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-Full.pdf. Amici do not endorse the use of any specific tool, and urge that any assessment tools should be transparent and tailored to avoid perpetuating racial disparities. Additionally, risk assessment instruments should be used only in conjunction with timely individualized assessments performed by impartial judicial decisionmakers.

In the District of Columbia, which also utilizes a risk-based assessment to evaluate pretrial-release options, data from FY 2016 showed that 91 percent of defendants released before trial made all scheduled court appearances.[10]

The data on pretrial criminal activity for released defendants are equally impressive: in Kentucky in 2014 and 2015, 94 percent of released defendants assessed to be low-risk committed no new criminal activity, *Kentucky 2014-2015 Data*, *supra*; in Washington, D.C., in FY 2016, 98 percent of all released defendants remained arrest-free from violent crimes during pretrial release, while 88 percent remained arrest free from all crimes. *DC PSA Budget Request*, *supra*, at 16.

And a study of impact of bond type on pretrial-release outcomes where pretrial supervision was ordered in all cases showed no

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[10] *See* Pretrial Servs. Agency for D.C., *Congressional Budget Justification and Performance Budget Request Fiscal Year 2018*, at 16 (2017), https://www.psa.gov/sites/default/files/FY%202018%20PSA%20Congressional%20Budget%20Justification.pdf [hereinafter *DC PSA Budget Request*]; *cf.* Christopher T. Lowenkamp & Marie VanNostrand, Laura & John Arnold Found., *Exploring the Impact of Supervision on Pretrial Outcomes* 3, 12 (2013), https://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_Supervision_FNL.pdf [hereinafter *Lowenkamp Study*] (in two-state study, defendants who received supervision were significantly more likely to appear for assigned court dates than those released without supervision).

significant differences in court-appearance rates or new criminal activity rates.[11]

Studies on the use of money bail, meanwhile, reveal that the practice is no more effective at mitigating the risk of nonappearance and results in significant negative outcomes, including increased rates of conviction and recidivism. *See* Arpit Gupta et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization,* 45 J. Legal Stud. 471, 472-75 (2016) (concluding, in study of Philadelphia and Pittsburgh court data, that money bail did not increase probability of appearance but was "a significant, independent cause of convictions and recidivism"); Heaton et al., *supra*, at 714-15 (using Harris County, Texas, misdemeanor case data and finding compelling evidence that pretrial detention "causally increases the likelihood of conviction, the likelihood of receiving a carceral sentence, the length of a carceral sentence, and the likelihood of future arrest for new crimes").

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[11] Claire M.B. Brooker et al., *The Jefferson County Bail Project: Impact Study Found Better Cost Effectiveness for Unsecured Recognizance Bonds Over Cash and Surety Bonds* 1, 6-7 (2014), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=5fd7072a-ae5f-a278-f809-20b78ec00020&forceDialog=0.

As the federal system and many states have recognized, pretrial supervision can also address some of the underlying drivers of criminal activity, thus breaking the cycle of recidivism and enhancing public safety. In Kentucky, dozens of diversion programs allow defendants to agree to comply with individually tailored terms in order to obtain dismissal of criminal charges. Terms may include alcohol and drug treatment, mental health and counseling services, educational, vocational and job-training requirements, and volunteer work. In 2012, Kentucky Pretrial Services supervised more than 4,000 misdemeanor diversion cases; 87 percent of misdemeanor clients successfully completed their programs, resulting in reduced trial dockets, decreased recidivism, and 25,000 hours of community service. Kentucky Pretrial Services, Administrative Office of the Courts, *Pretrial Reform in Kentucky* 6-7 (2013), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=95c0fae5-fe2e-72e0-15a2-84ed28155d0a&forceDialog=0.[12]

[12] In the last five years, over two-thirds of states passed legislation creating, authorizing, and expanding pretrial diversion programs. *See* Nat'l Conference of State Legislatures (NCSL), *Trends in Pretrial Release: State Legislation Update* (2018), http://www.ncsl.org/portals/1/ImageLibrary/WebImages/Criminal%20Justice/pretrialEnactments_2017_v03.pdf; *see also* NCSL, *Trends in Pretrial Release: State Legislation* 3-4 (2015),

In the District of Columbia, the Pretrial Services Agency (PSA) has responsibility for over 17,000 misdemeanor and felony defendants each year and supervises approximately 4,600 on any given day. *DC PSA Budget Request*, *supra*, at 1. PSA assigns supervision levels based on risk but also provides or makes referrals for treatment to defendants with substance-use and mental-health disorders. *Id.* at 20, 24. In FY 2016, 88 percent of all defendants in pretrial supervision remained on release status through the conclusion of the release period without any request for revocation based on noncompliance. *Id.* at 16.

Although pretrial-supervision and -diversion programs require resources, the financial cost is far less than that of pretrial detention. In the District of Columbia, considered one of the costlier jurisdictions because PSA personnel are paid on a federal pay schedule, supervision cost only about $18 per defendant per day in 2014. Clifford T. Keenan, Pretrial Servs. Agency for D.C., *It's About Results, Not Money* (2014), https://www.psa.gov/?q=node/499. Compared to the (conservative) $85-per-day estimate for pretrial detention, pretrial supervision is far more cost effective. *See* Pretrial Justice Inst., *Pretrial Justice, How*

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http://www.ncsl.org/portals/1/ImageLibrary/WebImages/Criminal%20Justice/NCSL%20pretrialTrends_v05.pdf.

Much Does It Cost? 1, 5 (2017), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=4c666992-0b1b-632a-13cb-b4ddc66fadcd; *see also* Marie VanNostrand & Gena Keebler, *Pretrial Risk Assessment in Federal Court*, Fed. Probation, Sept. 2009, at 17-18 (finding annual cost of pretrial detention until case resolution to vary between $18,768 and $19,912, while pretrial release and supervision averaged $3,860). Even limited and low-cost steps to encourage appearances, such as phone calls or text-message reminders about court dates, effectively reduce failure-to-appear rates.[13]

III. This Court Should Reject Arguments Made in Other Cases by the Bail Industry's Defenders

In this case, the petitioner has correctly acknowledged that California's bail system is "not only unjust, but . . . fails to make us safer." Pet'r's Br. at 12. But individuals with vested interests in the

[13] *See, e.g.*, Timothy R. Schnacke et al., *Increasing Court-Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado, FTA Pilot Project and Resulting Court Date Notification Program*, 48 Ct. Rev. 86, 89 (2012) (finding that reminder calls significantly decreased failure-to-appear rates); Jason Tashea, *Text-Message Reminders Are a Cheap and Effective Way to Reduce Pretrial Detention*, ABA J. (July 17, 2018, 7:10 A.M.), http://www.abajournal.com/lawscribbler/article/text_messages_can_keep_people_out_of_jail (describing effective reductions of failure-to-appear rates through text-message reminders in California and New York City).

perpetuation of money bail have repeatedly challenged attempts to reform these unjust systems around the country. Representatives of bail bondspersons, who have a direct financial stake in requiring incarcerated people to purchase their freedom through commercial surety bonds, have filed briefs as amici curiae in cases arising in Harris County, Texas,[14] and the City of Calhoun, Georgia.[15] And, in a federal class action challenging the City of San Francisco's money-bail schedule, the California Bail Agents Association was permitted to intervene to defend the practice when all defendants conceded its unconstitutionality. Order Granting Motion to Intervene, *Buffin v. City & County of San Francisco*, No. 15-cv-04959 (N.D. Cal. Mar. 6, 2017), ECF No. 119.[16]

[14] Brief for Am. Bail Coal. et al. as Amici Curiae Supporting Appellants, *ODonnell v. Harris County*, 892 F.3d 147 (5th Cir. 2018) (No. 17-20333) [hereinafter *ODonnell* Brief].

[15] Brief for Am. Bail Coal. et al. as Amici Curiae Supporting Defendant-Appellant, *Walker v. City of Calhoun*, 901 F.3d 1245 No. 17-13139 (11th Cir. 2018) [hereinafter *Walker* Brief].

[16] The bail industry is also making efforts to reverse Senate Bill 10 and reinstate the use of money bail in California. *See* Jazmine Ulloa, *Voter Referendum Drive Launched to Block Overhaul of California Bail System*, L.A. Times (Aug. 29, 2018, 1:51 P.M.) http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-may-2018-bail-industry-launches-voter-referendum-1535575316-htmlstory.html.

Meanwhile, the U.S. Court of Appeals for the Third Circuit recently rejected a request for a preliminary injunction in a bail industry-backed suit to attack New Jersey's reformed pretrial system that discourages money bail. The court found "no right" to money bail and that nonmonetary conditions of bail "allow[] the State to release low-risk defendants, who may be unable to afford to post cash or pay a bondsman, while addressing riskier defendants' potential to flee, endanger the community or another person, or interfere with the judicial process . . . ." *Holland*, 895 F.3d at 296, 303.

In other cases, bail-industry representatives have filed briefs raising the same mistaken arguments that have been advanced in *ODonnell*, *Walker*, *Buffin*, and *Holland*. As we now explain, these positions repeatedly but unavailingly put forward by money bail's defenders do not support its constitutionality.

A. The Historical Use of Money Bail Does Not Make Discrimination Based Solely on Inability to Pay Constitutionally Permissible

The bail industry has argued that money bail is constitutionally permissible because of lengthy history of use. As a result, the defenders claim, the *Bearden* line of cases should be interpreted to permit the

perpetuation of this "[i]nstitution [a]s [o]ld [a]s [t]he Republic." *Walker* Brief, *supra*, at 4; *see also ODonnell* Brief, *supra*, at 6-11.

Although *bail* broadly has a long history, *money* bail does not. The U.S. Supreme Court explained in *Stack* that the "[t]he right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty." 342 U.S. at 4. *Stack* recognized that assurances had evolved over time from "the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused" to "the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture." *Id.* at 5.

The first commercial surety operation for money bail reportedly opened for business in the United States only in 1898.[17] Indeed, for centuries before that, bail was a personal surety system under which the surety agreed to stand in for the accused upon default but was *not* permitted to be repaid or otherwise profit from the arrangement.

[17] *See* Timothy R. Schnacke, Nat'l Inst. of Corr., *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* 26 (2014), https://s3.amazonaws.com/static.nicic.gov/Library/028360.pdf ; *see also Holland*, 895 F.3d at 288-91 (thoroughly examining the history of bail and finding that the original meaning of the term "did not contemplate monetary bail").

Schnacke, *supra*, at 25-26. Only when the demand for personal sureties outgrew the supply, leading to many bailable defendants being detained, did American states begin permitting money bail. *Id.* at 26. Ironically, the purposeful move toward money bail to help more bailable defendants be released degenerated quickly into unnecessary pretrial detention due to bondspersons' demands for payment up front, *id.*, which, as this case illustrates, many defendants are unable to pay.

To the extent that its defenders attempt to rely on the modest history of *money* bail in particular, that history cannot sustain a system that offends equal-protection principles by detaining indigent defendants based solely on their inability to pay, while releasing those who can. The U.S. Supreme Court rejected a similar historical argument in *Williams v. Illinois*, 399 U.S. 235 (1970). In *Williams*, the defendant challenged a state law that resulted in him remaining incarcerated after the maximum statutory period of confinement because of his failure to pay fines and costs. Acknowledging that the custom of imprisoning indigent defendants for nonpayment of fines dated to medieval England and that "almost all States and the Federal Government have statutes authorizing incarceration under such circumstances," the Court made clear that "neither the antiquity of a

practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack." *Id*. at 239. The Court continued: "[t]he need to be open to reassessment of ancient practices other than those explicitly mandated by the Constitution is illustrated by the present case since the greatly increased use of fines as a criminal sanction has made nonpayment a major cause of incarceration in this country." *Id.* at 240.[18]

In *Williams*, the Court considered the state's interests in enforcing judgments against those financially unable to pay a fine and made clear that numerous alternatives to imprisonment exist that could be enacted by state legislatures or imposed by judges within the scope of their authority. 399 U.S. at 244-45 & n.21. In its final nod to history, the Court concluded, "We are not unaware that today's holding may place a further burden on States in administering criminal justice. . . .

[18] The bail industry has also argued that no Fourteenth Amendment equal-protection challenge should lie because the Eighth Amendment provides the textual source for the right to bail. *Walker* Brief, *supra*, at 21; *ODonnell* Brief, *supra,* at 24. Courts have not accepted this argument. In *ODonnell II*, the Fifth Circuit addressed the County's argument that the complaint was "an Eighth Amendment case wearing a Fourteenth Amendment costume." 892 F.3d at 157. Citing *Rainwater*, the Court there found that the County's argument was mistaken because "the incarceration of those who cannot pay money bail, without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements." *Id.* (quoting *Rainwater*, 572 F.2d at 1057) (alterations omitted)).

But the constitutional imperatives of the Equal Protection Clause must have priority over the comfortable convenience of the status quo." *Id.* at 245.

Here, not only is the "comfortable convenience of the status quo" constitutionally barred, but—just as importantly— it also is not a sensible way to ensure appearance in court and to promote community safety in light of more effective alternatives that are consistent with a fair and impartial criminal justice system. Money bail's defenders have argued that the commercial bail industry "provides the single most effective and efficient means of allowing defendants to obtain pretrial release while ensuring the protection of local communities." *Walker* Brief, *supra*, at 8; *see also ODonnell* Brief, *supra*, at 10-11. But as many studies establish, commercial bail is *not* more effective at ensuring appearance or law-abiding conduct than release on unsecured bonds and nonfinancial conditions of supervision.

B. A Bail System Premised on Individualized Assessments Is the Fairest and Most Effective Bail System.

Bail industry representatives have suggested elsewhere that the money bail system is preferable to "uniform detention, uniform unsecured bail, or uniform release subject to liberty-infringing conditions," *ODonnell* Brief, *supra*, at 11; *see also Walker* Brief, *supra,*

at 9. But neither the Court of Appeal, nor the parties, nor any amici advocate any of these extremes. A "uniform system" or "categorical rule" that fails to take into consideration the circumstances of individual defendants and their alleged crimes would not enhance public confidence in the system and—other than uniform detention—would do little to ensure appearances by defendants and public safety.

Money bail's defenders have also offered misleading evidence suggesting that the modern commercial surety system is statistically the most effective at ensuring court appearances. In doing so, they rely briefly on a handful of studies that largely do not purport to compare failure-to-appear rates of defendants released on commercial surety bonds with those released on nonfinancial conditions based on individualized risk assessments. *Walker* Brief, *supra*, at 12-16; *ODonnell* Brief, *supra*, at 14-17. Contrary to the bail industry's representations, the overwhelming weight of evidence demonstrates that secured money bail is not more effective than unsecured bonds or nonfinancial conditions in meeting the objectives of bail. In *ODonnell I*, the district court heard expert testimony and reviewed extensive academic and empirical studies, finding that secured money bail "does not meaningfully add to assuring misdemeanor defendants' appearance

at hearings or absence of new criminal activity during pretrial release." 251 F. Supp. 3d at 1119-20. This was true for both Harris County and studies of other jurisdictions, *id* at 1120, and studies show the same results for felony defendants, *see* Gupta, *supra*, 45 J. Legal Stud. at 496 (finding, in a combined study of misdemeanor and felony defendants, "that money bail has a negligible effect, or, if anything, increases failures to appear").

The bail industry's assertion that the imposition of pretrial conditions of release is itself constitutionally problematic, exemplified by the *Holland* litigation, is unfounded. The U.S. Court of Appeals for the Third Circuit soundly rejected the plaintiffs' arguments in that case, finding "no right to . . . monetary bail in the Eighth Amendment's proscription of excessive bail nor in the Fourteenth Amendment's substantive and procedural due process components." *Holland,* 895 F.3d at 302. The court there also rejected the plaintiff's Fourth Amendment argument about the intrusiveness of conditions of release. *Id.*

Where they have made the argument elsewhere, *ODonnell* Brief, *supra*, at 13-14, money bail's defenders have further relied on inapposite case law, particularly *United States v. Scott*, 450 F.3d 863

(9th Cir. 2006). But that decision hardly calls into question the constitutionality of pretrial supervision. In *Scott*, the defendant had agreed as a condition of pretrial release to random drug testing and home searches without a warrant, and later sought to suppress evidence found during a warrantless search. *Id.* at 865. Because the "unconstitutional conditions doctrine" limits the government's ability to exact waivers of constitutional rights—particularly Fourth Amendment rights—as a condition of benefits, the court held that Scott's consent to search was valid only if the search was reasonable. *Id.* at 866-68. The court never purported to address other pretrial conditions of release, nor did it suggest that conditions that do not directly infringe on well-established constitutional rights, such as those protected by the Fourth Amendment, raise any concerns.

The bail industry has also incorrectly complained that release on nonfinancial conditions is financially costly and a drain on pretrial supervision systems. *Walker* Brief, *supra*, at 14-15; *ODonnell* Brief, *supra*, at 12. But the financial cost of pretrial supervision pales in comparison to the cost of detention. *See supra* at 24.

C. The Bond Schedule's Facial Neutrality Does Not Save It From Constitutional Invalidation

Money bail's defenders have also attempted to deflect challenges to bail schedules by arguing that "[d]efendants who cannot post bail are not detained because they are poor, but instead because the government had probable cause to arrest them and charge them with a crime, and wishes to secure their appearance at trial." *Walker* Brief, *supra*, at 16; *see also* ODonnell Brief, *supra*, at 17. The Supreme Court rejected this very argument in *Williams*:

> It is clear, of course, that the sentence was not imposed upon appellant because of his indigency but because he had committed a crime. And the Illinois statutory scheme does not distinguish between defendants on the basis of ability to pay fines. But, as we said in *Griffin v. Illinois*, "a law nondiscriminatory on its face may be grossly discriminatory in its operation." Here, the Illinois statutes as applied to Williams works an invidious discrimination solely because he is unable to pay the fine. . . . By making the maximum confinement contingent upon one's ability to pay, the State has visited different consequences on two categories of persons since the result is to make incarceration in excess of the statutory maximum applicable only to those without the requisite resources to satisfy the money portion of the judgment.

399 U.S. at 242 (citation omitted).

The bail industry has also denied that what *they* portray as the bail schedule's equal treatment of charged defendants could possibly violate the Equal Protection Clause, *Walker* Brief, *supra*, at 4, implying

that a system that takes individual circumstances, including indigence, into consideration would "discriminate in favor of the indigent[.]" *Id.* But this argument, too, was rejected in *Williams*. The U.S. Supreme Court there recognized that nonenforcement of judgments against those financially unable to pay "would amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction." 399 U.S. at 244. But nonenforcement was unnecessary, *Williams* explained, because states could rely on alternative enforcement mechanisms that did not result in imprisonment of indigents beyond the statutory maximum for involuntary nonpayment of fines and court costs. *Id.* at 244-45.

This solution was reiterated in *Tate v. Short* a year later, when the U.S. Supreme Court applied the *Williams* analysis to invalidate the practice of imprisoning indigents for failure to pay the fine on a fines-only offense: "There are, however, other alternatives to which the State may constitutionally resort to serve its concededly valid interest in enforcing payment of fines." 401 U.S. 395, 399 (1971); *see also Bearden*, 461 U.S. at 668-69 ("[I]t is fundamentally unfair to revoke probation automatically without considering . . . alternative[s] . . . .").

Amici recognize and share the interest of the petitioner, the State of California, and the general public in ensuring that defendants appear for trial and do not commit crimes while on pretrial release. But, as discussed, alternatives exist that are not only constitutional, but also more effective. They promote a justice system that avoids perpetuating modern-day debtors' prisons that incarcerate individuals based on lack of wealth, and that inherently erode community trust.

CONCLUSION

The Court of Appeal's ruling that the trial court erred by failing to consider ability to pay in determining bail should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Rule 8.520(c) of the California Rules of Court, the undersigned counsel for amici curiae hereby certifies that the foregoing brief was produced on a computer in 14-point type. The word count, including footnotes but excluding those parts not subject to the word-count limitation is 7645 words, as determined by the Microsoft Word word-processing system.

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